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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO PEREZ,

Defendant and Appellant.

D067675

(Super. Ct. No. SCD230265)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Reversed and remanded with directions.

Laura P. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

Armando Perez, having exercised his right to self-representation, pleaded guilty to first degree murder (Pen. Code,¹ §§ 187, subd. (a), 189) with the special circumstance of killing the victim by means of lying in wait within the meaning of section 190.2, subdivision (a)(15), and personally using a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1). After accepting Perez's guilty plea, the court sentenced him to life without the possibility of parole (LWOP) plus an additional one year to run consecutively.

Section 1018 provides in part, "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel." In *People v. Chadd* (1981) 28 Cal.3d 739, 751 (*Chadd*), overruled on other grounds as stated in *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 374, the California Supreme Court held that in a capital case, section 1018 does not violate the constitutional right to self-representation established in *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

In this case, the plain terms of section 1018 prohibited the trial court from receiving Perez's guilty plea. Moreover, the Attorney General concedes that the California Supreme Court "has made clear that it has already considered 'the interplay' between . . . section 1018 and the right to self-representation in *Faretta* in the context of a death sentence."

¹ All statutory references are to the Penal Code unless otherwise specified.

However, the Attorney General contends this case is materially distinguishable from *Chadd* because Perez was not sentenced to death, but instead to LWOP. The Attorney General asserts that "[b]ased on the unique circumstances" here, Perez's constitutional right to self-representation "should take precedence" over section 1018.

We reject the Attorney General's argument that section 1018 is unconstitutional in this LWOP case. Although *Chadd* involved a capital offense, in rejecting the argument that section 1018 violates *Faretta*, the court in *Chadd* also stated, "Even in noncapital cases the state has properly circumscribed the right to plead guilty in order to protect defendants against the consequences of their own folly or neglect." (*Chadd, supra*, 28 Cal.3d at p. 751, fn. 8.) Unless and until the California Supreme Court limits or overrules *Chadd*, we follow it.² (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Therefore, because Perez was self-represented when he pled guilty to a felony for which the maximum punishment is LWOP, section 1018 precluded the court from receiving his guilty plea. The judgment must be reversed and the matter remanded with directions to strike Perez's guilty plea.

² The constitutionality of section 1018 is an issue briefed in an automatic death penalty appeal now pending in the California Supreme Court in *People v. Miracle*, S140894.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Murder and Arrest

Because of the limited nature of the issue in this appeal, we need not recite the facts of the case in detail. In October 2010 Perez's estranged wife, Diana Gonzalez, was found murdered in a bathroom at San Diego City College. The evidence at Perez's preliminary hearing showed Gonzalez died from multiple stab wounds. There was also sexual mutilation of her body consisting of stab wounds to the perineal region, and the word "bitch" was carved into her back.

At Perez's preliminary hearing, there was evidence that Perez was on the campus that evening, and a soiled shirt found near the murder contained at least eight stains matching Perez's DNA profile. There was also evidence that after Gonzalez was killed, Perez stole a car and drove to Mexico.

Perez was charged with murder in violation of section 187, subdivision (a), and it was also alleged Perez committed the murder by lying in wait within the meaning of section 190.2, subdivision (a)(15). The district attorney also alleged Perez personally used a deadly and dangerous weapon, a knife, in committing the offense, within the meaning of section 12022, subdivision (b)(1).

In February 2012 Perez was arrested in Tijuana, Mexico, for Gonzalez's murder. As required by Mexico for the extradition of a Mexican national, the district attorney promised to not seek the death penalty. After extradition, Perez entered a plea of not guilty and the office of the public defender was appointed to represent him.

B. *Perez Makes Three Unsuccessful Marsden Motions*

Between February and September 2013, Perez brought three separate motions seeking to replace his appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118.³

1. February 2013

In February 2013 Perez complained that his appointed attorney, Michael Garcia, was not adequately representing him

Perez did not invoke any right to self-representation at this hearing. However, Perez stated he knew he had the right to "waive" counsel, and Garcia informed the court that Perez threatened to represent himself unless Garcia agreed to handle the case the way Perez wanted.

The court denied Perez's *Marsden* motion.

2. June 2013

In June 2013 Perez asked for another *Marsden* hearing, again asserting Garcia was not properly handling the case. After Garcia responded, the court denied Perez's motion.

3. September 2013

At a hearing in September 2013, the court noted that at the preliminary hearing "Mr. Perez had made some noises about wanting to represent himself or wanting a different lawyer. Actually, both. [¶] . . . [¶] I want to be very clear that, if Mr. Perez . . . wishes to change that status, that's got to occur sooner, rather than later,

³ "The seminal case regarding the appointment of substitute counsel is *Marsden*, *supra*, 2 Cal.3d 118, which gave birth to the term of art, a '*Marsden* motion.'" (*People v. Smith* (1993) 6 Cal.4th 684, 690.)

because this case is going to trial on January the 8th. [¶] If Mr. Perez thinks he wants to step into the ring with Floyd Mayweather all by himself without having Mr. Garcia by his side, then I'm going to need to know about that."

Responding, Perez stated, "[T]here's two issues. One of them is *Faretta* rights that I have to represent myself." Perez asked the court for the "deadline" for asserting his *Faretta* rights. The court responded, "Today. [¶] . . . [¶] . . . [R]ight now."⁴

Perez stated he first wanted to bring another *Marsden* motion and, if that were denied, then "do my *Faretta* motion."

The court conducted a *Marsden* hearing. Perez again complained Garcia was not adequately representing him and that he had a conflict with Garcia.

Garcia refuted Perez's assertions.

After denying Perez's *Marsden* motion, the court stated it wanted to give Perez "a chance to give careful thought" to self-representation and set a hearing for that purpose the following Friday.

C. The Court Grants Perez's Faretta Motion

On October 4, 2013, Garcia informed the court that Perez wanted to become self-represented. After giving Perez time to review the applicable form, the court asked Perez if wanted to exercise his right of self-representation. Perez said, "Yes." Perez signed the

⁴ In *Faretta*, the United States Supreme Court held that a defendant in a state criminal prosecution has a constitutional right under the Sixth and Fourteenth Amendments to waive counsel and represent himself. (*Faretta, supra*, 422 U.S. at pp. 818-821.)

form, which the court referred to as "local court form CRM-046, commonly referred to as a *Lopez* or *Faretta-Lopez* waiver."

After asking Perez about his educational background and experience, and after admonishing Perez about the difficulties of self-representation, the court granted Perez's motion for self-representation.

The court appointed the office of assigned counsel to provide "ancillary and legal runner services," but declined to assign a "standby lawyer" to do research or otherwise assist Perez.⁵

D. The Court Reopens and Grants the September 2013 Marsden Motion

At a hearing in November 2013, the supervising attorney of the office of assigned counsel, Milly Durovic, appeared with Perez and told the court, "I believe that there is information that I need to bring to the court's attention to supplement the *Marsden* hearing which was originally brought by Mr. Perez." Durovic asked the court to exclude the deputy district attorney so she could make a record "as an agency as to what I feel needs—was not properly done. [¶] And Mr. Perez was not in a position to bring this to the court's attention because he was unaware of this."

The court excused the prosecutor and "reopen[ed]" the *Marsden* hearing that occurred on "September 7 of 2013 [*sic*—should be September 27]." Durovic stated that in a routine interview her office conducts with self-represented defendants, Perez reported certain historical information relevant to his mental state and competency.

⁵ The office of assigned counsel provides investigative services and other related ancillary services for criminal defendants who are self-represented.

Durovic asked the court to grant the reopened *Marsden* motion, find a conflict with the public defender's office, and appoint the alternate public defender to represent Perez.

Based on these representations, and with Perez's consent, the court indicated it was inclined to retroactively grant Perez's September 2013 *Marsden* motion and appoint counsel for Perez from the alternate public defender's office.

Perez asked the court if this meant he was no longer self-represented. The court replied affirmatively, but added that if Perez voluntarily requested "pro per status and there is no legal reason not to, then you may have that [pro per status] back."

Perez asked if he could remain self-represented pending the results of a psychiatric examination. The court said, "No"—counsel would have to be appointed now to obtain medical records, consult with an expert, conduct appropriate tests, get funding for the tests, and get court orders for examinations.

After Durovic spoke privately with Perez, she told the court Perez had "legitimate concerns" about DNA testing and other issues. She said "it is a trust issue." Durovic assured Perez and the court she would personally see that his issues would be addressed by his appointed lawyer.

The court stated that the information Durovic reported "is potentially huge." It proposed to appoint the alternate public defender and revoke Perez's self-represented status without prejudice to reinstating it at a future time.

Durovic urged Perez to agree to this and "[d]o the smart thing." But Perez asked the court if there was "any way" of first deciding his pending motion to continue the trial

and, only after that was ruled on, to have this *Marsden* hearing. The court declined, telling Perez he must act on the *Marsden* issue right now—did he want a new lawyer or not.

Perez next asked whether the court would be inclined to grant a trial continuance if he accepted counsel now, but later sought to be self-represented. The court refused to answer directly, but stated, "If we end up continuing this trial for four months and you have a new lawyer working on it, and then one week before that new trial date you say, oh, Judge, I want to go pro per, probably not going to let you. But if otherwise the lawful requirements are met, then I will."

Perez said he wanted counsel.

The court said it was not finding ineffective assistance, but rather a conflict between Garcia and Perez that is "sufficiently fundamental that Mr. Perez is entitled to new counsel." Because of that conflict, the court appointed counsel from the alternate public defender's office.

With the deputy district attorney back in the courtroom, the court stated it had now granted the *Marsden* motion and appointed the alternate public defender to represent Perez. The court added, "I revoke Mr. Perez's pro per status. I do that without prejudice to his seeking to have that status reinstated provided the lawful conditions for that occurring are met"

E. The Court Vacates Its Reopened Marsden Order, Restores Perez to Self-Represented Status in Part, and Orders a Competency Examination

On December 16, 2013, the court conducted a hearing to review its orders stemming from the reopened *Marsden* hearing. Garcia told the court he did not have a conflict with Perez and Durovic's representations were "improperly made." Garcia stated that having a *Marsden* hearing in his absence was "not appropriate."

The court agreed with Garcia, stating it had made a mistake by reopening the *Marsden* hearing and by appointing the alternate public defender to represent Perez. The court vacated those orders.

However, still concerned about Perez's mental competency, the court ordered proceedings suspended pending a competency examination of Perez to be conducted by the county department of mental health.⁶

The court ordered Perez restored to the self-represented status he had at the beginning of the hearing on November 22, 2013, based on his earlier *Faretta* request of October 4, 2013.

The court suspended proceedings and vacated the trial date pending the competency determination. The court appointed the primary public defender's office to represent Perez on the issue of competency.

⁶ The court stated, "I have observed the defendant in court responding to questions and making arguments that, in my lay opinion, suggest that he is out of touch with reality and is unable to understand and accept the existence of physical evidence that seems beyond dispute. [¶] . . . [¶] . . . I have a concern as to he is—whether he is delusional"

Perez asked the court, "So, am I pro per or not?" The court said, "Insofar as the case is concerned, you are pro per. Your pro per status was restored to you.

However, . . . the law says that whenever I order somebody to be evaluated to determine whether they are competent to stand trial, I have to appoint counsel for them. So counsel has been appointed for you for that purpose."

F. The Court Restores Perez to Self-Represented Status

In February 2014 the examining psychiatrist reported Perez was competent to stand trial and to represent himself. The prosecutor and counsel for Perez did not disagree with that conclusion. Based on the report, the court found Perez competent and reinstated proceedings. Because Perez was self-represented when the court suspended proceedings for the competency examination, the court stated that Perez "goes back to that self-represented status" he held before the now vacated reopened *Marsden* hearing.

The prosecutor agreed, stating, "I agree. . . . He is now self-represented again." However, the prosecutor also reminded the court that the psychiatric report stated Perez was interested in being represented by counsel, so long as appointed counsel was someone other than Garcia. The prosecutor asked the court to ask Perez whether he wanted to remain self-represented or instead be represented by the public defender.

By this time, Garcia had been transferred to an administrative position at the office of assigned counsel. He was no longer available to represent Perez. Nevertheless, Perez claimed to still have a conflict with the entire public defender's office, stating:

"I still feel that there's . . . a conflict of interest with the public defender's office. And at this moment I would like to have like another—whatever time you could give me to be able to show that

conflict of interest, if it is needed. If it is not needed, then,—what I don't want is to be able to be put back with the public defender's office. And I have my reasons. But if I don't have to say the reasons right now, then I will still continue pro per."

Richard Gates, the attorney from the public defender's office who was representing Perez on the competency issue, stated, "I am not sure—if Mr. Perez is making a request to represent himself."

The court reviewed the case history, noted that Perez had executed a valid *Faretta* waiver and that the court had previously found there was no ineffective assistance of counsel. The court found that Perez was attempting to create a conflict by disagreements with counsel's tactical decisions, and the court stated Perez had no right to switch attorneys for his reason. The court stated it was "satisfied" that any member of the public defender's office would conduct effective representation, and if there was a conflict, it was because Perez did not want to hear his lawyer's advice. Stating he "decline[d] to revisit the question of conflict," the court stated, "Mr. Perez, you are representing yourself."

G. Perez Represents Himself for Nine Months of Motion Hearings

Perez represented himself for the next nine months in motion hearings in March, April, May, June, August, October, and November 2014.

In the October 2014 hearing, Perez complained that his request for investigation and experts was being denied, and he suspected Garcia was orchestrating these denials as "boss" of the office of assigned counsel.

When Perez further complained about the office of assigned counsel, the court stated, "You have had months to file motions. Mr. Perez, you are manipulating. I don't believe most of what you are telling me. You say you have a conflict with Michael Garcia, who is one of the finest and recognized as one of the finest deputy public defenders, and now you have a conflict with the woman who is helping you from OAC [office of assigned counsel]. You know, what this tells me is that you are the source of the conflict."

H. The Court Denies Perez's Motion to Dismiss

On November 4, 2014, Perez sought to dismiss the charges on the grounds the office of assigned counsel denied his right to prepare a defense by not funding ancillary services that would have led to exculpatory evidence. Perez also argued that Garcia was ineffective because he only saw him three times and did not give him all discovery. Perez asserted, "I just tried to get rid of him [Garcia] the whole time and get another attorney on me to help me." Perez claimed that since Garcia was transferred to the office of assigned counsel as deputy director, "I have been just having a hard time getting any kind of adequate assistance from the office of assigned counsel."

The court denied Perez's motion, stating, "I find that the alleged facts on which this motion is based are not true. They are incorrect. These allegations are incorrect. I find that the facts are to the contrary."

Perez also sought to disqualify the court "for refusing him to allow to proceed in pro per without acknowledging and agreeing to the legal ramifications of proceeding in pro per." Perez complained that the court used the wrong waiver form, he was

improperly required to waive certain rights to become self-represented, and was "forced" to sign the court's waiver form.

Responding to and refuting these assertions, the prosecutor stated that after the defendant was sent for a competency evaluation, he came back and:

"[Defense Attorney Richard Gates] was here representing him for the [competency evaluation], the defendant was afforded another opportunity to get a different attorney from the public defender's office. He said he did not want anybody from the public defender's office and that he at that time reaffirmed his desire to be pro per. So I just wanted to remind the court and put that as part of the record that that occurred; that he reasserted his interest in being pro per, that he wasn't forced to be pro per, because at that point he could have had another attorney from the public defender's office."

Perez replied, stating he did not want representation from the public defender's office because Garcia worked there. He said he was willing to be represented by an alternate public defender, "which was granted," and he would "definitely relinquish my rights to represent myself" if he had a lawyer having nothing to do with the public defender's office. He stated:

"And I remember that I had a choice at that time to be able to choose to lawyer up by the public defender's office, but—and I was going to take the alternate public defender, which was granted. And I was willing to get it done under the alternate public defender or even a panel lawyer that had nothing to do with the public defender's office."

The court denied Perez's motion, stating, "Your motion to disqualify the court has no factual basis, and it is denied."

Next, Perez moved to disqualify the office of assigned counsel, alleging a conflict because Garcia was now deputy director. After Durovic told the court Garcia had been

screened from Perez's case, the court denied Perez's motion, stating, "Mr. Perez has been soundly impeached in his factual statements and representations in just about every hearing that we have conducted in this case."

I. The Court Denies Perez's Request for a Lawyer

On November 14, 2014, during a hearing scheduled for in limine motions, Perez began by stating, "I want to be able to have a continuance, if I may, to be able to lawyer up"

Perez stated he no longer wanted to represent himself and claimed he chose to be self-represented "because I would rather represent myself than to have my ex-lawyer that never did nothing [*sic*] for my defense." Perez further asserted he was forced to sign the *Lopez* waiver, and he asked the court to appoint a lawyer who "has nothing to do with the public defender's office because of this conflict."

The court denied Perez's motion as "untimely" and made an "express finding" that Perez is doing this "for purposes of manipulating the case and delaying the case." The court stated, "You have had ample opportunity to make this decision before now. We have had hearing after hearing on motions. You have had ample opportunity to see what you were up against." "I find that you are doing this just to delay the case, that you knew full well what was coming in this case. I think you are manipulating the system. And it is not going to happen." Perez reiterated, "I want a chance to get a lawyer." The court replied, "I am not going to let you do that. You are going to try the case yourself. That's why we are here."

J. Perez Pleads Guilty

Jury selection began on November 18, 2014. Perez, self-represented, conducted his inquiry of prospective jurors the next day.

On November 24, 2014, before the prosecutor began her opening statement, Perez asked the court to dismiss the jury, stating, "I want to plead guilty to all charges"

The court dismissed the jury. The court asked Perez if he understood that by pleading guilty to murder with the alleged special circumstances, the sentence would be "life without the possibility of parole." Perez stated he understood that he "would have [to] live out the rest of [his] natural life in prison."

Perez insisted he understood what he was doing by pleading guilty and "as a man that loves my kids and I love my wife, I plead guilty to all charges because that's exactly what happened." The court reiterated, "You will receive a life commitment to the California Department of Corrections. You will serve that with no credits for good behavior. It would be a term that would last for your natural life. Do you understand that?" Perez replied, "Yes, sir."

Perez then pleaded guilty to premeditated first degree murder, admitted he did so by lying in wait, and admitted he personally used a deadly and dangerous weapon, a knife.

After the prosecutor stated she was satisfied with the "advisals as given and factual basis," the court accepted the pleas and admissions and set a sentencing hearing for January 16, 2015.

K. *The Court Rejects Perez's Motion to Withdraw His Plea*

On January 13, 2015, Perez filed a motion to withdraw his guilty plea and to be allowed to enter a new plea of not guilty by reason of insanity. Perez asserted his guilty plea was the result of extreme emotional distress and an uncontrolled impulsive reaction of helplessness and a nervous breakdown.

The prosecutor stated she had received Perez's motion only the previous day. She asked the court for "two weeks" to prepare a brief because she was "looking at Penal Code section 1018" and had "some concerns." She added, "I was going to invite the court to look at it and maybe have research attorneys look at it."

The court replied, "I am prepared to address [section] 1018 today." The prosecutor said, "Great. Thank you."

The prosecutor began by noting that when Perez returned from the competency examination, he was given an opportunity to have a different attorney appointed but refused, stating he wanted to represent himself.

Perez responded, stating he was willing to be represented by the alternate public defender's office. He said the court denied that request because "Garcia had came [*sic*] and talked to you when I was representing myself and you had an in-chambers conference. And I don't know what he said. I don't know what he told you. [¶] But Ms. Milly from OAC granted the alternate public defender. And it got denied because Michael Garcia wasn't here on that *Marsden* motion that you granted on the conflict of interest. So that's the reason why I denied having a public defender, because there was a conflict with all of them."

The court rejected Perez's assertions about Garcia, stating Perez's claim was "categorically incorrect. It is false. It is not supported by the evidence." The court also found that the office of assigned counsel "has been diligent in its assessment of Mr. Perez's requests." Reviewing the history of Perez's self-representation, the court stated:

"Mr. Perez did assert his sixth amendment constitutional right to self-representation after the court denied his *Marsden* motion with respect to Mr. Garcia. The court was aware that sometimes defendants make a knee-jerk or equivocal emotional demand for self-representation when a *Marsden* request has been denied. In an effort to make sure that that was not what was occurring here, I postponed it a week and said to Mr. Perez to think it over. A week later he came back into court and he in writing and orally unequivocally demanded his constitutional right of self-representation. The court went through an extended colloquy with him and informed him that factually speaking this was an unwise decision.

"Add to the mix at some point in the proceedings the court was concerned about whether he was competent either to stand trial or to represent himself. A highly-qualified evaluator concluded without reservation that he was competent to do both. The court expressly asked this evaluator, consider the question of mental competence for self-representation. And that's an emerging area of the law, and this evaluator found that Mr. [Perez] was.

"Mr. [Perez] has, I believe, with due respect, persistently asserted that this case has to be done his way. He asserts that he has the right to decide which appointed lawyer he will get. This court and another court found no ineffectiveness and no valid conflict of interest. He, when he requested to go pro per, even objected to the conditions that the law says a pro per defendant must labor under. And those were explained to him carefully, and he initially objected to that and wanted to do it his way. But the law doesn't let you do it that way.

"He was granted the right of self-representation. And I am satisfied that that was—the court had no choice but to do that. He made an absolutely unambiguous demand for self-representation and ultimately accepted the hardships thereof."

The court found there were no grounds to set aside Perez's plea. Turning to section 1018, the court stated:

"[S]ection 1018 . . . specifies that no plea of guilty to death, which this isn't, or to life without parole, which this is, shall be received by the court from an accused who does not appear with counsel unless the accused expressly waives counsel. I am paraphrasing that section."

Noting that Perez had been self-represented for "a year in this case," the court held Perez "waived the applicability of section 1018" and is "estopped to assert it." The court added that section 1018 may not "override the federal constitutional jurisprudence of self-representation, nor may it override one's right to plead guilty"

L. Sentencing and Appeal

The court sentenced Perez "to life imprisonment without the possibility of parole" plus a one-year additional consecutive term for using a knife. On March 10, 2015, the court issued a certificate of probable cause, and Perez's notice of appeal was filed the same date.

DISCUSSION

I. SECTION 1018 PROVIDES A SELF-REPRESENTED DEFENDANT CANNOT PLEAD GUILTY TO A FELONY PUNISHABLE BY LIFE WITHOUT POSSIBILITY OF PAROLE

Perez contends that under section 1018 the trial court had no authority to accept his guilty plea to an LWOP offense because he was not represented by counsel at the time of the plea. We agree.

A. *Section 1018*

Section 1018 provides that a defendant may not plead guilty to a felony for which the maximum penalty is death or LWOP without representation by, and consent of, counsel. In relevant part, section 1018 states:

"Unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself or herself in open court. *No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel.* No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him or her of the right to counsel and unless the court shall find that the defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel." Italics added.

In requiring a defendant who desires to plead guilty to a capital or LWOP offense to be represented by counsel, section 1018 is designed to protect both the defendant and the integrity of the judicial process by assuring that such a serious step is a fully informed one. The California Supreme Court has consistently treated this language in section 1018 as clear and unambiguous in its prohibition against the entry of a guilty plea in a capital case by an unrepresented defendant.

Over 60 years ago, in *People v. Ballentine* (1952) 39 Cal.2d 193 (*Ballentine*), the California Supreme Court considered a case nearly identical to the relevant facts here. In *Ballentine*, the unrepresented defendant pleaded guilty to murder and robbery. Before

entering his plea, the defendant waived his right to counsel and acknowledged he understood the seriousness of the charges. (*Id.* at pp. 194-195.)

On appeal, the defendant in *Ballentine* asserted the court had no authority to receive and act on his guilty plea entered without representation because section 1018 provided "[n]o plea of guilty of a felony for which the maximum penalty is death . . . shall be received from a defendant who does not appear with counsel." (*Ballentine, supra*, 39 Cal.2d at p. 195.) The Attorney General argued the acceptance of the plea in violation of section 1018 was harmless error because the defendant "intelligently and voluntarily waived his right to counsel." (*Ibid.*)

The California Supreme Court in *Ballentine* rejected the Attorney General's argument and held that in section 1018, "[t]he Legislature has deprived the court of the power to accept a guilty plea from a defendant charged with a felony punishable with death when he is not represented by counsel." (*Ballentine, supra*, 39 Cal.2d at p. 196.) The *Ballentine* court noted that section 1018 does not prevent a defendant from waiving the right to counsel; rather, it merely prohibits the court from receiving a guilty plea to a felony for which the maximum penalty is death when such a plea is made by an unrepresented defendant. (*Ballentine*, at pp. 195-196.)

The California Supreme Court considered section 1018 again in *Chadd, supra*, 28 Cal.3d 739. Between the time *Ballentine* was decided, and *Chadd* arose, the Legislature had amended section 1018 to provide that not only must a defendant seeking to plead guilty to a crime punishable by death or LWOP be represented when pleading guilty, but

such counsel must "consent" to the guilty plea. (See Baric & Bollard, *California Supreme Court Survey* (1981) 8 Pepperdine L.Rev. 1111, 1120-1121.)

In *Chadd*, the defendant, who was represented by counsel, sought to plead guilty to a capital crime, but his attorney advised against the plea and did not consent. (*Chadd*, *supra*, 28 Cal.3d at p. 744.) The trial court ruled it could find the defendant sufficiently competent to represent himself, and the court would then accept the guilty plea despite counsel's refusal to consent. (*Id.* at p. 745.) The California Supreme Court rejected this attempt to evade section 1018 by stating, "[I]t is difficult to conceive of a plainer statement of law than the rule of section 1018 that no guilty plea to a capital offense shall be received 'without the consent of the defendant's counsel.'" (*Chadd*, at p. 746.)

The third sentence of section 1018 deals with noncapital and non-LWOP offenses. Unlike the second sentence, which applies to capital and LWOP felonies, the third sentence of section 1018 contains an exception for self-representation. The third sentence of section 1018 provides:

"No plea of guilty of a felony for which the maximum punishment is *not* death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him or her of the right to counsel and *unless the court shall find that the defendant understands the right to counsel and freely waives it*, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel." (Italics added.)

In *Chadd*, the California Supreme Court stated that interpreting section 1018 to permit a self-represented capital defendant to plead guilty after waiving the right to counsel "would thus obliterate the Legislature's careful distinction between capital and

noncapital cases, and render largely superfluous its special provision for the former. Such a construction would be manifestly improper." (*Chadd, supra*, 28 Cal.3d at p. 747.)

The *Chadd* court further explained that a guilty plea is "the most serious step a defendant can take in a criminal prosecution." (*Chadd, supra*, 28 Cal.3d at p. 748.) The plea "strips the defendant of such fundamental protections as the privilege against self-incrimination, the right to a jury, and the right of confrontation." (*Ibid.*) As to the merits, the plea "is deemed to constitute a judicial admission of every element of the offense charged" and "supplies both evidence and verdict." (*Ibid.*) A guilty plea "is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." (*Ibid.*)

In light of these consequences, the Legislature "has demonstrated an increasing concern to insure that no defendant enter a guilty plea in our courts without fully understanding the nature and consequences of his act." (*Chadd, supra*, 28 Cal.3d at pp. 748-749.) In requiring a defendant who wishes to plead guilty to a capital offense to be represented by counsel, section 1018 "is obviously designed to protect defendants by assuring that such a serious step is a fully informed and competent one, taken only after consideration with and advice by counsel." (*Chadd, at p. 749.*)

The California Supreme Court in *Chadd* also discussed the relationship between the right to self-representation established in *Faretta, supra*, 422 U.S. 806, and the restriction on that right contained in section 1018. The court rejected the assertion that section 1018 is an unconstitutional infringement on the right to self-representation recognized in *Faretta*. The *Chadd* court noted that "*Faretta* does not purport to

guarantee a defendant acting in propria persona the right to do any and all things his attorney could have done." (*Chadd, supra*, 28 Cal.3d at p. 750; *People v. Massie* (1985) 40 Cal.3d 620, 624 (*Massie*).) The court in *Chadd* further noted, "Nothing in *Faretta*, either expressly or impliedly, deprives the state of the right to conclude that the danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant's right to plead guilty in capital cases is subjected to the requirement of his counsel's consent." (*Chadd, supra*, 28 Cal.3d at p. 751.)

In *People v. Alfaro* (2007) 41 Cal.4th 1277, 1300 (*Alfaro*), the California Supreme Court reaffirmed that "section 1018 has its roots in the state's strong interest in reducing the risk of mistaken judgments in capital cases and thereby maintaining the accuracy and fairness of its criminal proceedings." The *Alfaro* court reiterated its holding in *Chadd* that section 1018 does not violate the constitutional right of self-representation under *Faretta*. (*Alfaro, supra*, 41 Cal.4th at p. 1299.) More recently, in *People v. Mai* (2013) 57 Cal.4th 986, 1055 (*Mai*), the California Supreme Court reiterated that under section 1018, "a plea of guilty to a capital felony may not be taken except in the presence of counsel and with counsel's consent. [Citation.] Even if otherwise competent to exercise the constitutional right of self-representation [citation], a defendant may not discharge his lawyer in order to enter such a plea "

B. *Analysis*

Perez was self-represented when he pled guilty to first degree murder with special circumstances, which in his case carries the maximum penalty of LWOP. The second

sentence of section 1018 states, "No plea of guilty of a felony for which the maximum punishment is . . . life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel" Therefore, under section 1018, the court was prohibited from accepting that plea.

The trial court committed two errors in reaching a contrary result. First, the court erroneously paraphrased section 1018 by conflating the second and third sentences of the statute. As noted, *ante*, the second sentence in section 1018 deals exclusively with capital and LWOP cases, and provides that a guilty plea in such a case cannot be entered without the consent of the defendant's lawyer. The third sentence in section 1018 deals with noncapital and non-LWOP offenses, and provides that a self-represented defendant who has validly waived the right to counsel may plead guilty to such charges.

The court erroneously combined the two distinct provisions together by stating, "Section 1018 . . . specifies that no plea of guilty to . . . life without parole, which this is, shall be received by the court from an accused who does not appear with counsel *unless the accused expressly waives counsel*." (Italics added.) As explained in *Chadd, supra*, 28 Cal.3d at page 747, such a construction of section 1018 is "manifestly improper."

Second, the trial court erred in declaring that section 1018 may not "override the federal constitutional jurisprudence of self-representation, nor may it override one's right to plead guilty" In *Chadd, supra*, 28 Cal.3d at page 751, the Supreme Court considered and rejected that assertion.

The Attorney General concedes that in the context of capital crimes, the "California Supreme Court has made clear" that section 1018 is constitutional despite the

right of self-representation recognized by the United States Supreme Court in *Faretta*. Nevertheless, the Attorney General contends *Chadd*, *Alfaro*, and *Mai* are distinguishable because the defendants in those cases faced the death penalty, whereas Perez faced a maximum sentence of LWOP. The Attorney General asserts that as applied here, an LWOP case, section 1018 unconstitutionally infringes upon Perez's right to self-representation.

However, contrary to the Attorney General's assertions, the controlling California Supreme Court cases are not materially distinguishable. The second sentence of section 1018, which prohibits a self-represented defendant from pleading guilty to certain offenses, applies to both a "plea of guilty of a felony for which the maximum punishment is death, *or* life imprisonment without the possibility of parole" (§ 1018, italics added.) Thus, to the extent *Chadd*, *Alfaro*, and *Mai* discuss the application of section 1018 to capital cases, their statutory analysis also applies to LWOP cases.

Moreover, in the context of a capital case, the California Supreme Court in *Chadd* stated nothing in *Faretta* deprives the state from the "minor infringement of the right of self-representation" resulting when a defendant's right to plead guilty in a capital case is subject to his counsel's consent. (*Chadd, supra*, 28 Cal.3d at p. 751.) The court in *Chadd* reached this conclusion because "in capital cases . . . the state has a strong interest in reducing the risk of mistaken judgments." (*Ibid.*) Significantly, in so holding, the *Chadd* court also stated, "Even in noncapital cases the state has properly circumscribed the right to plead guilty in order to protect defendants against the consequences of their own folly or neglect." (*Id.* at p. 751, fn. 8.) Although this latter statement is dicta, even dicta from

our state Supreme Court "'should be considered persuasive' and followed by the intermediate appellate courts." (*People v. American Contractors Indemnity Co.* (2015) 238 Cal.App.4th 1041, 1047, fn. 3; see *Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 66 [dicta from our Supreme Court's decisions "command our serious respect"].) Unless and until *Chadd* is limited or overruled, we are compelled to apply it here.

The Attorney General also contends the constitutional holding in *Chadd* is distinguishable because Perez represented himself for 14 months before deciding to plead guilty, sought "abundant discovery" and "made copious investigative service requests." The Attorney General asserts that as a result, Perez "knew the strengths and weakens of his case better than any defense counsel." In a related argument, the Attorney General contends the court properly received Perez's guilty plea because Perez "made the deliberate and unequivocal decision to proceed 'pro per'" and Perez was "competent, and understanding" in "voluntarily exercising his informed free will" to represent himself.

However, the Supreme Court in *Ballentine* rejected a similar argument, holding that section 1018 prohibits receiving a guilty plea to a capital offense from a self-represented defendant even where the defendant "intelligently and voluntarily waived his right to counsel." (*Ballentine, supra*, 39 Cal.2d at p. 195.)

Moreover, even apart from *Ballentine*, the record simply belies the Attorney General's attempt to equate Perez's legal acumen to that of an attorney. Perez has no formal education beyond the 11th grade. The trial court likened Perez's self-representation against the experienced prosecutor to stepping "into the ring with Floyd Mayweather all by himself." In December 2013 the trial court believed Perez was "out of

touch with reality" and "unable to understand and accept the existence of physical evidence that seems beyond dispute." The court also commented that Perez had "reportedly made outbursts in court in the presence of media regarding his involvement" in the murder. In November 2014—just two months before Perez pleaded guilty—the trial court commented, "I have noticed throughout these proceedings that Mr. Perez seems to have difficulty understanding how the system works."

The Attorney General also contends the court's error in applying section 1018 is harmless because the evidence of Perez's guilt at the preliminary hearing was "overwhelming" and "a reasonable attorney could have consented to appellant's guilty plea." However, the Attorney General cites no authority for applying a harmless error analysis when a guilty plea is received in violation of section 1018. To the contrary, in *Chadd*, the Supreme Court held the section 1018 error "requires that the judgment be reversed" (*Chadd, supra*, 28 Cal.3d at p. 754.) The Supreme Court reached a similar conclusion in *Massie* stating, "The judgment must be reversed insofar as it convicts defendant of first degree murder . . . and finds true the special circumstances alleged in support of that count." (*Massie, supra*, 40 Cal.3d at p. 625.) In *Ballentine, supra*, 39 Cal.2d at page 197, the Supreme Court similarly stated, "[t]he judgment is reversed with directions to the trial court to strike" the guilty plea.

The Attorney General argues that if represented by counsel, Perez would have entered the same plea with counsel's consent. But this is pure speculation. Moreover, the evidence of Perez's guilt, which the Attorney General characterizes as "overwhelming," was presented in Perez's preliminary hearing, not in a trial.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to strike Perez's plea of guilty and for further proceedings consistent with this opinion.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.